IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 633 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RHOMBIC LABORATORY & 1 - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR BM MANGUKIYA for Appellant(s) : 1 - 2.
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,
NOTICE SERVED for Opponent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 16/03/2007

ORAL JUDGMENT

Both the appellants are original accused of Criminal Case No.3 of 1995 decided on 26th June, 1997, who have been held guilty for the offence

punishable under Sections 3 and 7 of the Essential Commodities Act and for violation of paragraph 10 of the Drugs (Price Control) Order, 1987 and the appeal has been preferred under the provisions of Sections 374 read with Section 386 of the Code of Criminal Procedure.

2. Mr.Mangukia, learned Counsel appearing for the appellants has taken me through the judgment under challenge as well as the various grounds of challenge mentioned in the memo of appeal. Mr.Mangukia, learned Counsel and Ms.Pandit, learned A.P.P., both have taken me through the documentary evidence as well as oral evidence referred too by the learned trial Judge while recording conviction and dealing with technical defence that were raised during the course of trial.

3. Of course, Mr.Mangukia, has argued at length on legal issues as well as on factual metrics, however, he has concentrated his argument mainly on three aspects.

i) The learned Judge ought to have held that

on the date of filing of the complaint the Drugs (Price Control) Order, 1987 was repealed by new Control Order i.e. Drugs (Price Control), Order, 1995 with effect from 6th January, 1995, no action was initiated against the accused under Drugs (Price Control), Order, 1987 and therefore the things referred to in sub-clause 2 of paragraph–27 only were saved. The prosecution would not survive on account of alleged violation of 'repealed' Drugs (Price Control) Order, 1987.

ii)It is in evidence that accused were of the view that on the date of application of the Drugs (Price Control) Order, 1987 they were already manufacturing the very drug formulation i.e. Quinine Tablets – 300 under the licence of manufacturing and as they had not started manufacturing of that tablet after application of Drugs (Price Control), Order, 1995 and therefore it was not necessary for the accused to get the

price approved from the authority. Even, otherwise, keeping that view they had already requested to the competent authority by a written application sent in a format that their price structure of Quinine Tablet – 300 should be accepted as mentioned in the schedule and necessary consent be sent to them. This document is at Exh.27. It was sent by Registered Post A.D. to the competent authority and the Registered A.D. Slip is at Exh.25. So, keeping the scheme of General Provision regarding Price Formulations i.e. Paragraph – 10 of Drugs (Price Control), Order, 1987 on the date of inspection, price structure is sent in the month of August 1994, could have been construed as approved price structure and so on the date of prosecution or say on the date of visit i.e. 31st March, 1995, the M.R.P. tage could not have been said or to be treated as price “not approved” by the competent authority.

iii)The complainant, Shri M.K.Sureja, had no authority to institute a criminal prosecution for the offence punishable under Section 7 read with Section 3 of the Essential Commodities Act because he was not authorized by the State Government to file a complaint. He cannot be construed as the aggrieved person within the meaning of Section 11 of scheme of Essential Commodities Act. He cannot institute prosecution as public servant within the meaning of Section 21 of the Indian Penal Code read with Section 11 of the Essential Commodities Act. So, on such prosecution, the learned trial Judge ought not to have taken even cognizance and in an illegally instituted prosecution, the accused could not have been held guilty of the charge levelled against him. Merely, because the accused had faced the charge, cannot be construed as waiver of such legal important plea. This should be treated as serious

prejudice to accused.

4. While developing the above arguments mainly advanced on point No.1, Mr.Mangukia has taken me through the relevant provisions of Sections 6 of the General Clauses Act so also the other relevant paragraphs of Price Control Order, 1995. He has also taken me through the relevant schedules of Drugs (Price Control), Order, 1987 and 1995 and it is argued that if the schedule of the Drug of both these different control orders i.e. Repealed Control Order and the new Price Control Order are compared then, it is appearant that in the Control Order of 1995, the drug 'Quinine' was not included in the schedule of drugs. So, the prosecution instituted by the complainant was contrary to the new Price Control Order. As no effective action was initiated under the earlier Drugs (Price Control) Order 1987, the complainant could not have instituted criminal case.

5. The learned trial Judge has appreciated the documents which are at Exh.15 and 26, in paragraph

12 of the judgment and it appears that the learned trial Judge has concentrated on one aspect that drug formulation of a particular batch was manufactured on 21/7/1993 and 22/7/1993. The bills as to sales are of 27/7/1993 and the formulation manufactured was sold to various Chemists at Jamnagar, Keshod, Rajkot and at other places. The material therefore was dispatched on 27/7/1993. On that day atleast there was no approval, is the observation of the learned Judge. In the same way, it is observed, keeping in mind the conditions of manufacturing and testing, that drug formulation of batch No.401 and 407 (Exh.26) was sent after marketing the entire stock manufactured. Referring to paragraph – 10 of the Price (Control) Order, 1987, it has been held that any action of selling Quinine – 300 Tablets, a drug formulation, prior to price approval was violative of said paragraph. For the sake brevity and convenience, the Court would like to reproduce the relevant paragraph – 10 of the 1987 Control Order.

"10. ***General provisions regarding prices of***

formulations.--(1) *No manufacture or importer shall market a new formulation or a new pack, or a new dosage form of his existing formulation specified in Category I or Category II of the Third Schedule without obtaining the prior approval of its price from the Government.*

(2) No person shall sell or dispose of any imported formulation specified in Category I or Category-II of the Third Schedule without obtaining the prior approval of this price from the Government.

(3) Any manufacturer or importer, who desires to obtain the approval of the Government in respect of the price for any formulation referred to in sub-paragraph (1) or sub-paragraph (2), shall make an application to the Government in Form 2 or Form 3, as the case may be, and the Government, may, within a period of four months of the receipt of an application accord its approval, subject to such modification as it may consider necessary:"

"Provided that where approval is not accorded within the said period of four months, the manufacturer or importer, as the case may be, may market the new formulation or new dosage form referred to in sub-paragraph (1) at a price not exceeding the price claimed by him in his application after intimating the Government accordingly:

Provided further that the Government may, if it considers necessary, by order, revise the price as declared by the manufacturer or importer as the case may be, and upon such revision, the manufacturer or importer shall not sell such formulation at a price exceeding the price so revised."

5.1 Paragraph – 10 requires to be read with paragraph – 11 wherein it is provided that every manufacturer or importer of non-schedule formulation within 30 days of commencement of this Order shall submit to Government separate price list of such formulation in Form – V. So the persons who were

manufacturing at the time when Drugs (Price Control), Order, 1987 was made applicable, were asked to send a price list of Drug Formulation in Form – IV. So the say of prosecution is that the accused was already manufacturing Quinine – 300 Tablet even prior to Drugs (Price Control), Order, 1987 which was made effective from 26th August, 1987, they could have produced the relevant evidence. Quinine was a drug included in first schedule and that too in the list of I-formulation. If the manufacturing activity had commenced after the commencement of Drugs (Price Control), Order, 1987, then in the background of sub-paragraph (1) of Paragraph -10, the price was required to be approved. The crucial question before the Court is raised that whether a prosecution could succeed after four months from the date of the request forwarded to the Central Government for approval of the price structure and that too for manufacturing and marketing the very formulation prior to 16th August, 1994. The date on which the request for approval was forwarded, could have been shown as a

cause for institution of prosecution under Drugs (Price Control), Order, 1987 within four months therefrom and / or prior to effective date of Drugs (Price Control), Order, 1995. The language of sub-paragraph (2) and (3) of paragraph – 10 and proviso made thereunder gives clear indication that any manufacturer or importer who desires to obtain approval of the Government in respect of price of any formulation, he has to make an application to the Government in prescribed format and the Government was under obligation to communicate its decision within a period of four months and if the approval is not accorded within the said period of four months, the manufacturer or importer can market the formulation or new pack or new dose. So on the date of prosecution or even prior thereto on expiry of the four months from the date of receipt of the request for approval, no successful prosecution could have been launched and the accused could have been accorded benefit of doubt atleast. Because in the present case as discussed earlier, there is nothing on record to show that from which date the

accused had started manufacturing of Quinine–300 Tablets and had started its marketing. The price list under Paragraphs 4 and 5 of the Drugs (Price Control), Order, 1987 was required to be sent to the Government qua drug not included in the schedule. The successful prosecution could have been launched prior to repeal of Drugs (Price Control), Order, 1987 and prior to expiry of first four months from 16th August, 1994. But, here the facts that have come on record are significant and the facts are;

A. the accused were of the view that as the Tablet Quinine was not a drug falling in the category where the Government had either fixed the price or had decided any price and therefore if the price structure is within the formula mentioned in paragraph 6 of Drugs (Price Control), Order, 1987 then, no formal approval was required to be sought for.

B. Irrespective of this contention, they had sent a formal request to approve the price

structure on 16th August, 1994.

C. The Central or the Competent Authority had not decided qua the price structure suggested by the accused and it is not even the say of the prosecution that the request made by the accused was refused.

D. The prosecution ought to have led indicative evidence qua the clear assertion about forwarding of the proposal on 16th August, 1994 and there is no such evidence. When the Registered Post A.D. Slip (Exh.25) is produced, there is no reason for the trial Court to discard the evidence. The learned trial Judge has not discarded this evidence, but has attempted to interpret the effect of these two documents and has observed that even for the sake of argument, if these documents are believed to be genuine and they are accepted as true, a successful prosecution can be instituted and the accused can be linked with the crime because they had manufactured and sold the drug

formulation of Quinine-300 Tablets even in the year 1993. The logic expressed by the learned trial Judge is not supported by the legal situation because to bring home the charge, the prosecution was also supposed to establish the element of *mens rea* as observed by the Apex Court in case case of **Nathulal Vs. State of Madhya Pradesh, reported in A.I.R. 1966 S.C. 43 (VOL. 53 C12).** Here, in the present case, the accused are consistent even while sending request for approval. So, there is enough force in argument of Mr.Mangukia that on the date of inspection or search i.e. on 31st March, 1995, the accused persons had deemed approval of price structure.

6. It is relevant to note that it is neither a case of the prosecution nor even implied finding that the accused were responsible for either overpricing or black marketing of drug shown in the schedule – III of Drugs (Price Control), Order, 1987. The learned Judge has rightly observed that

charge levelled against the accused is technical and cannot be said to be that serious. Of course, these observations have been made while deciding quantum of punishment. But the learned Judge ought to have considered that on 31st March, 1995, the accused were neither manufacturing nor selling drug which had not even deemed approval.

6.1 No notice has been given to the accused prior to lodging of criminal complaint. On the contrary, the document shows that higher authority of the complainant had taken decision to initiate a detailed inquiry and the complainant was asked to take legal steps after due inquiry on 3rd May, 1995(Exh.27) and on 16th June, 1995 (Exh.28) the Competent authority passed formal order to file a criminal complaint and Senior Drug Inspector was asked and authorized to file a complaint. So, on the date of complaint, it was not possible for the complainant to say that accused was selling a drug formulation which has no approval of the price. Prior to expiry of the effect of Drugs (Price Control), Order, 1987 i.e. 5th January, 1995 the accused had atleast deemed approval. It is not the

finding of the learned trial Judge that though on the date of complaint or on the date on which the authority decided to file a criminal complaint, the accused persons had deemed approval of the price, however still they are responsible for committing the offence as they have manufactured and sold a drug formulation prior to formal approval of the price in past i.e. in the year 1993.

7. In this situation, this Court cannot ignore the ratio of the decision in case of **Nathulal Vs. State of Madhya Pradesh, reported in A.I.R. 1966 S.C. 43 (VOL. 53 C 12)**, and the accused deserves to be given the benefit of doubt observing that they had no intention to either manufacture or market the Quinine – 300 Tablets without seeking prior approval of the Government. They have pointed out this aspect to the complainant and to this Court successfully. This part of evidence has been discussed that practically all throughout the State of Gujarat, number of manufacturers were manufacturing and marketing the similar drug and they were also charging the same or similar price.

8. There is enough force in argument of Mr.Mangukia that when Drugs (Price Control), Order, 1987 was repealed, the accused could not have been prosecuted especially when the Quinine is not the Drug in the schedule of Drugs (Price Control) Order, 1995. As mentioned earlier, the authorities appointed under the Drugs and Cosmetics Act, 1940 had visited the business premises for inspection and other purposes on 31st March, 1995. The new Drugs (Price Control), Order, 1995 repealed the earlier Drugs (Price Control) Order, 1987. The new Drugs (Price Control), Order, 1995 had become operative since 6th January, 1995. So, entry of the Officers in the business premises either for search, seizure or inspection, could not have been said to be an act as provided by paragraph–23 of the Drugs (Price Control), Order 1987. On that day the authority was under obligation to ascertain from the first schedule whether Tablet Quinine is one of the drugs included in the list of drugs mentioned in Schedule–I. While appreciating this argument, the Court has gone through the background of earlier relevant schemes and it is clear that Drugs (Price Control)

Order, 1970 was repealed by paragraph – 30 of Drug (Price Control), Order, 1979. It cannot be repealed by Drugs (Price Control), Order 1987. Many provisions are analogous and / or materially similar in the Drugs (Price Control), Order 1987. But, the drugs mentioned including the formulation in the schedule of Drugs (Price Control), Order 1987 materially vary from the earlier Order which was there in the year 1979, except certain changes in names of drugs and effect of the ultimate scheme. Quinine was at Sr. No.18 in Schedule I of Bulk Drugs Use in Category-II Formulation. In the same way, Quinine was included in schedule or bulk drug, but it was taken in category I and it was shown under heading IV i.e. National Malaria Eradication Programme. The Drugs (Price Control), Order 1987 was having the other schedule naming bulk drug and in that schedule about 167 drugs were mentioned and another schedule III was in reference to category-I and category-II formulations. While in Drugs (Price Control) 1995, there is only one schedule and 75 drugs have been included. Initially, 76 drugs were mentioned but one drug shown at Sr.No.76 was omitted

from list vide Notification dated 2nd September, 1997 published in Government Gazette.

9. Learned A.P.P., as well as Mr.Mangukia have gone through the list of drugs mentioned in Schedule – I. I have also seen the list and Quinine is not included in list. Now, this situation requires to be considered in light of the language of paragraph – 29 taking care of repeal and saving. Like many other cases, the relevant is sub-clause-2 and the same requires to be read in reference to Clause-1 under which the Drugs (Price Control), Order 1987 has been repealed. The sub-clause -2 starts with an non-obstante clause. This clause should be read and interpreted in the background of scheme of Section 6 of the General Clauses Act. Of course, different drug price control Orders have been introduced. However, the status of the Statute have remained perpetuals as and when they were in force. The distinction between what is and what is not, preserved by a provision of Section 6 of the General Clauses Act, is often one of fact finding as is observed by the Apex Court in case of **Bansidhar and Others Vs. State of Rajasthan and Others,**

reported in A.I.R. 1989 S.C. 1614. But, it is settled as explained in this cited decision quoting the observation of Lord Atkin's, that *"the mere right, existed at the date of repealing statute, to take advantage of Provisions of the statute repealed is not a right accrued within the meaning of the usual saving clause."*

10. General savings of right accrued and liabilities under the Repealed Act by force of Section 6 of General Clauses Act are subject to a control intention envisaged by the Repealing Act. Non-mention of the drug Quinine in the schedule indicated and enforced in the year 1995 expresses the contrary intention of the legislature. This is not a case of bare repealing. It is true that in case of bare repealing there is hardly any room for contrary intention. But, here the contrary intention is reflected because Statute is to be read in reference to the schedule attached with it and the difference given therein qua words referred in the Statute.

11. In case of **Patel Rambhai Bechasrbhai and**

another Vs. Patel Dahyabhai Becharbhai and another, reported in A.IR. 1967 S.C. 162 (V 54 C 32) of course the Court was dealing with a case under Bombay Agriculture Debtors Relief Act, 1939 which was repealed by subsequent legislation of 1947. The Supreme Court has held that new Act had application to both, the substantive as well as to procedural provisions to pending proceedings. It is rightly argued by Mr.Mangukia that as such there was no pending proceedings on the date on which Drugs (Price Control), Order 1995 become operative. There was not even investigation or legal proceeding or any proceeding in reference to remedy in respect of any such right, privilege, or even application was made requesting for approved price structure. On the contrary say of Mr.Mangukia is that but for the gesture shown by the accused of sending proposal in the month of August, 1994, it would not have tempted the department to initiate prosecution after expiry of four months when the accused had already a deemed approval of the price structure.

12. The observation made by the Apex Court in case of **Sales Tax Officer, Jabalpur Vs. Hanuman**

Prasad, (1967) MPLJ 138 (SC) would help the logic placed before the Court. Of course the Apex Court was dealing with an order of assessment made by the Sales Tax Officer. The Officer has passed the order of assessment on 23/5/1959, but shortly after the new Act coming into force. Meaning thereby the proceeding practically were pending for orders that were initiated under the old Law. Here the situation is different but the ratio can help the accused.

13. Mr.Mangukiya has placed reliance on the following decisions of the Apex Court, but for the present case in light of earlier observations, no detailed discussions is required.

i) **A.I.R. 1997 SC 412, in case of Gajraj Singh etc., Vs. The State Transport Appellate Tribunal and Others.**

ii) **A.I.R. 2000 (2) SCC 536, in case of Kolhapur Canesugar Works Ltd. & Anr. Vs. Union of India & Ors.**

iii) **2002 (3) SCC 481, in case of State of Punjab Vs. Harnek Singh.**

14. The Court would also like to reproduce the

relevant part of the judgment in case of **Kolhapur Canesugar Works Ltd. & Anr. Vs. Union of India & Ors., reported in AIR 2000 SUPREME COURT 811.**

"It is not correct to say that in considering the question of maintainability of pending proceedings initiated under a particular provision of the rule after the said provision was omitted the Court is not to look for a provision in the newly added rule for continuing the pending proceedings. It is also not correct to say that the test is whether there is any provision in the rules to the effect that pending proceedings will lapse on omission of the rule under which the notice was issued. In such a case the Court is to look to the provisions in the rule which has been introduced after omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such a proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there

is a pari-material provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the rule. In the absence of any such provision in the statute or in the rule the pending proceedings would lapse on the rule under which the notice was issued or proceeding was initiated being deleted/omitted."

14.1 In the present case, deletion of Quinine from the list of drug / formulation mentioned in the schedule is relevant fact and after commencement of new Drugs (Price Control), Order, 1995, the prosecution could not have been instituted under Drugs (Price Control), Order, 1987.

15. The number of other decisions have been referred to by learned A.P.P., as well as Mr.Mangukiya during the course of their oral submissions, but it would not be necessary to discuss these judgments as they are not in reference to various Clauses of Section 6 of the General Clauses Act. It is settled that Court should look to the language of the saving clause of repealing

section and the language of that clause should be interpreted in light of Section 6 (e) of the General Clauses Act. In the present case, no proceedings were initiated under Drugs (Price Control), Order 1987 till 6th January, 1995. No action could have been brought which can be said to be a fresh initiation of proceedings under the old Statute which was repealed by a fresh Drugs (Price Control) order and on this count also the accused can be given the benefit.

16. The filing of a criminal complaint by the complainant-Drug Inspector, was also not by an authorized person as per the Act in view of scheme of Section 12 (AA)(1)(e) of the Essential Commodities Act. Of course, it is mentioned in the complaint by the complainant Mr.M.K.Sureja that he was Senior Drug Inspector of Drugs and Food Department. Mr.Sureja has admitted in his deposition that at relevant point of time he was Drug Inspector and not a Senior Drug Inspector. He was simply holding the charge of Senior Drug Inspector and he was paid special allowance for holding the charge as per the Government Norms. So, I do not find any

force in argument of Mr.Mangukiya that he may not be considered as Senior Drug Inspector. It would not be proper for the Court to observe that he has wrongly designated him as Senior Drug Inspector at the time of filing of the complaint. However, the crucial question would be whether he as Senior Drug Inspector, could have filed a complaint for the offence punishable under Section 7 read with Section 3 of the Essential Commodities Act. In the complaint, it is averred by the complainant that he has been authorized by his Superior and he is a public servant within the meaning of Section 21 of the Indian Penal Code and therefore authorized to initiate criminal action as per provision of Section 11 of the Essential Commodities Act. The complainant would not have filed a criminal complaint unless he is authorized by the State Government under a Special or General Order. The Order at Exh.29 indicates that complainant was transferred from Ahmedabad to Bhavnagar as Drug Inspector on 2nd May, 1990. Exh.30 shows that he was holding charge of Senior Drug Inspector from 10th October, 1994 to 9th October, 1995 i.e. for about a year. The Notification (Exh.31) would not help the

prosecution. A plain reading of the said Notification issued by the Heath and Family Welfare Department on 12th August, 1992 simply indicates by referring designation that who are Officers authorized in pursuance of paragraph – 23 of the Drugs (Price Control) Order, 1987. This Notification would survive irrespective of the repealing of Drugs (Price Control) Order, 1987 in light of saving clause of Paragraph-7 of Drugs (Price Control) Order, 1995. However, the Court is supposed to read paragraph -21 of Drugs (Price Control) Order, 1995 instead of paragraph-23 of Drugs (Price Control) Order, 1987 because the intention of the Government is to authorize certain Officers to act and to comply with the scheme of Paragraph-21 of the Drugs (Price Control) Order, 1995. For the sake of convenience, the Court would like to refer paragraph-23 of the Drugs (Price Control) Order, 1987, as the prosecution before the trial Court was in reference to Drugs (Price Control) Order, 1987.

> ***"23. Power of entry, search and seizure,*** *-- (1) Any Gazetted Officer of the Central Government or of a State Government authorized by a general or special order by the Central*

Government or, as the case may be, by the State Government in this behalf may, with a view to securing compliance with this Order or to satisfy himself that the provisions of this Order have been complied with--

(a) enter and search any place;

(b) seize any drug, alongwith the containers, packages, or coverings in which the drug is found, in respect of which he suspects that any provision of this Order has been, is being, or is about to be, contravened, and thereafter take all measures necessary for securing production of the drug, containers, packages or coverings, so seized, in a court of law and for their safe custody pending such production;

(c) seize any document, such as, cash memo or credit memo books, books of account and records of purchase and sale of the drugs in respect of which he suspects that any provision of this Order has been, is being, or is about to be contravened.

(2) The provision of Sec. 100 of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure shall, so far as may be, apply to searches and seizures under this

Order.”

17. This Notification does not speak about authority to initiate criminal proceeding / prosecution under the Essential Commodities Act. Paragraph – 26 of the Order refers the penalty and so also about application of provisions of Essential Commodities Act, 1955. The legislature ought not to have missed the aspect and the effect of Section 12 (AA) (1) (e) of the Essential Commodities Act. There is nothing on record to show that Mr.M.K.Sureja was authorized to file a complaint under the Essential Commodities Act against the accused by State Government. Here, the observations made by this Hon'ble Court (Coram: Mr.Justice S.R.Brahmbhatt, J.) in case of **STATE OF GUJARAT Versus DHARAMSHI MORARJI CHEMICALS CO LTD & ORS., decided on 30/6/2006** would positively help the accused. Of course, the Court was dealing with a Criminal Revision Application but the ratio positively would help the accused. For the sake of brevity and convenience, the Court would like to reproduce the relevant paragraph of the judgment. In this cited decision, the Court was dealing with an order passed by the learned

Additional Sessions Judge & Special Judge, Bhavnagar, in Criminal Case No. 2 of 1987, on 25th February, 1999, below application at Exh.10.

> *"The contention taken in the revision application is that the trial Court has accepted overruled judgment and ratio, which is, in fact, misconceived. In fact, the contention taken on behalf of the prosecution is that the provisions of Section – 11 of the Essential Commodities Act, empowers any public servant to maintain the complaint in Special Court. It been appropriately dealt with by the trial Court. It is required to be noticed that the trial Court has essentially allowed the discharge application Exh.10 on the ground that the complaint was not maintainable as it was not filed by the competent and authorized officer. The trial Court has relied upon the decision of Patna High Court reported in* ***1991 Criminal Law Journal Page-720*** *in case of* ***Suresh Singh V/s. The State of Bihar*** *and has recorded its finding that the complaint was not filed by the competent officer, who is specially authorized to file the complaint before the Special Court against the accused. The reliance placed by the prosecution on the provisions of Section – 11 and/or by the applicant on the provisions of Section – 21 of the Code of Criminal Procedure, defining the public servant, would be of no avail to the application, in view of the fact that the*

Essential Commodities Act being a Special Act shall be viewed in its proper perspective. The Section - 11 of the Essential Commodities Act; 1955, though, provides that the complaint could be filed and maintained by the public servant as defined under Section – 21 of the Indian Penal Code but Section 12(AA)(1)(e) of the Essential Commodities (Special Provision) Act; 1981, which makes special provision by way of amending the Essential Commodities Act; 1955, provides that, the Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an Officer of the Central Government or a State Government authorized in this behalf by the Government concerned or any person aggrieved or any recognized consumer association, whether such person is a member of that association or not, take cognizance of that offence without the accused being committed to it for trial. Thus, the complainant, who was acting in his capacity as public servant was required to have the special authorization under Section 12(AA)(1)(e) of the Essential Commodities (Special Provision) Act; 1989 for lodging and maintaining the complaint against the accused person in Special Court. The trial Court has recorded that despite ample opportunity given to the complainant and prosecution for production of such authorization, it was not produced before the Court and

therefore, it was recorded by the trial Court that the complainant lacked the authorization to file the complaint. The applicant's reliance upon the Notification dated 2nd February, 1996 showing that the Agricultural Inspector was authorized is of no avail in view of the fact that the authority if at all shall not be treated to have been conferred upon the Agricultural Inspector with retrospective effect. In fact, the requirement of issuance of Notification in the year 1996 appointing and authorizing the Agricultural Inspector to lodge prosecution in respect of Clause – (e) of Sub-section (1) of Section – 12(AA) of the Essential Commodities Act. The Act, itself, goes to show that the public servant in his capacity as such without being a special authority could not have maintained the complaint."

18. Refereeing the above cited judgment in case of **STATE OF GUJARAT Versus DHARAMSHI MORARJI CHEMICALS CO LTD & ORS.,** and keeping in mind the other aspects, the prosecution instituted by Officer of the rank of Assistant Director against the accused was not found a prosecution initiated by the Competent Officer authorized by the State Government. The Clause–(e) of Section 12 (AA) puts

an embargo on the jurisdiction of the Court while taking cognizance. Special Courts constituted under Section 12 (A) are authorized to take cognizance upon a perusal of the Police Report of the fact of constituting of an offence under this Act or upon a complaint made by the Officer of the Central Government or State Government authorized in this behalf by the State Government concerned or by the person aggrieved or any recognized consumer / association. Here, the prosecution is neither by a person aggrieved nor is based on a police report submitted under Section 173 of the Code of Criminal Procedure. When the say of the complainant is that he is a Government Officer then he ought to have produced either special or general powers conferred by the State Government authorizing him personally or the Officers of his cadre and rank to institute such criminal prosecution. How the conviction can sustain in a badly instituted prosecution is the question. In case of **STATE OF GUJARAT Versus DHARAMSHI MORARJI CHEMICALS CO LTD & ORS.,** the Court has observed that such a prosecution is not sustainable in the eye of law.

19. Keeping the totality, factual as well as legal aspect in mind, the present appeal requires to be allowed. The Court is of the view that the learned trial Judge has erred in not appreciating these crucial factual aspects discussed while dealing with point No.2 advanced by Mr.Mangukiya and other two legal aspects that have been placed. These two legal aspects also go to the root of the validity of the prosecution and the finding of guilt and therefore conviction requires to be quashed and set aside.

20. In the result, present Criminal Appeal No.633 of 1997 is allowed. The judgment and order of conviction and sentence dated 26th June, 1997 rendered by the learned Special Judge, Bhavnagar in Special Criminal Case No.3 of 1995 is hereby quashed and set aside. The appellants are acquitted of all the charges levelled against them for violating the provisions of Section 3 read with Section 7 of the Essential Commodities Act. Fine, if paid by the appellants, is ordered to be refunded to them on proper identification.

20.1 Bail Bonds executed by the appellants-accused shall stand discharged. Order and Direction accordingly.

21. Before parting with the order, the Court is inclined to observe that certain other factual aspects were also brought to the notice of the Court and number of arguments were also concentrated on the liability of accused No.2 and his role in the entire incident, adequacy and cogent evidence, etc., but the same have not been dealt with or discussed, as the same was not warranted on account of other finding recorded qua three major points pressed into service by the Counsel appearing for the appellants.

(C.K.BUCH, J.)

sompura